Supreme Court, U.S.
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No. 99-1935

IN THE

Supreme Court of the United States

COLUMBUS-AMERICA DISCOVERY GROUP, INC.,

Petitioner,

v.

ATLANTIC MUTUAL INSURANCE COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

GUILFORD D. WARE
DAVID H. SUMP
CRENSHAW, WARE & MARTIN
1200 Bank of America Center
One Commercial Place
Norfolk, VA 23510
(757) 623-3000

JOSEPH A. YAMALI
Counsel of Record
GEORGE R. DALY
BIGHAM ENGLAR JONES
& HOUSTON
40 Wall Street, 24th Floor
New York, NY 10005
(212) 269-5500

Attorneys for Respondents

160697

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

39pp

QUESTIONS PRESENTED

1. Should this Court review the Petition for a Writ of Certiorari after this litigation was settled in accordance with a Settlement Agreement and Dismissed Agreed Order in which all claims and issues between the parties were dismissed with prejudice?

2. By accepting the benefits of the Settlement Agreement and Dismissed Agreed Order, and selling the *res* it was awarded, does the Petitioner have standing to now request the Supreme Court to review the admiralty law test for abandonment of property as it was applied by the Fourth Circuit in this case in 1992?

3. Does the law of the case doctrine preclude reconsideration of the decision rendered by the Fourth Circuit in 1992 in which this Court denied *certiorari* in 1993?

4. Should this Court review the admiralty law test for an abandonment of property when there is no conflict among the circuits and this Court, in *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 528 (1998), conclusively provided the meaning of "abandoned" under the Abandoned Shipwreck Act of 1987, 43 U.S.C. § 2101-2106?

5. Should this Court consider the Petition for a Writ of Certiorari when the relief requested will rewrite the Abandoned Shipwreck Act of 1987, 43 U.S.C. § 2101-2106?

LIST OF PARTIES AND STATEMENT PURSUANT TO RULE 29.6

The following are the Respondents and their corporate affiliations:

Atlantic Mutual Insurance Company has no parent company and no publicly held company owns ten percent or more of its stock.

Royal & Sun Alliance Insurance Company plc is the parent company of the London Assurance, Alliance Assurance Company, Ltd. and Marine Insurance Company, Ltd. No publicly held company owns ten percent or more of the stock of these Respondents.

CGU International Insurance plc is the parent company of Indemnity Marine Insurance, Ltd. No publicly held company owns ten percent or more of the stock of this Respondent.

Axa Insurance plc is the parent company of Royal Exchange Assurance. No publicly held company owns ten percent or more of the stock of this Respondent.

Superintendent of Insurance of the State of New York.

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Atlantic Mutual Insurance Company, *et al.* (hereinafter "Respondents" or "Underwriters"), respectfully submit this brief in opposition to the Petition for a Writ of Certiorari filed by the Columbus-American Discovery Group, Inc. (hereinafter "Petitioner" or "CADG"). The Petition raises no issues that merit review.

STATEMENT OF JURISDICTION

There is no jurisdictional basis for granting the Petition for a Writ of Certiorari. The Court of Appeals for the Fourth Circuit remanded this case to the district court to re-enter a Dismissed Agreed Order which confirmed the parties Settlement Agreement and dismissed all claims and issues in the litigation with prejudice. Because the Petition does not seek to set aside the Settlement Agreement or vacate the Dismissed Agreed Order there is no case or controversy pending for review and thus there is no jurisdiction in this Court. Furthermore, there is no conflict among the United States Courts of Appeals and this case does not involve an important question of federal law. *See* Sup. Ct. R. 10 (a)-(c).

COUNTERSTATEMENT OF THE CASE

In 1988 CADG discovered the sunken wreck of the S.S. CENTRAL AMERICA and in 1989 brought an *in rem* proceeding in the United States District Court for the Eastern District of Virginia to assert its ownership of, or, in the alternative, a salvage lien on the insured cargo of gold aboard the vessel when it sank off the coast of South Carolina in 1857. In September 1989, the original Underwriters, or their successors in interest who paid claims and became the subrogated owners of the commercial shipment of gold, intervened in the *in rem* proceeding and asserted their

ownership interest. (Pet. App. 6a-7a). The district court ruled that the Underwriters had intentionally destroyed their file documents which evidenced an abandonment of their interests in the commercial shipment of gold. *Columbus-America Discovery Group, Inc. v The Unidentified Wrecked and Abandoned Sailing Vessel*, 742 F. Supp. 1327, 1348 (E.D. Va. 1990). (Pet. App. 95a, 129a-139a). On appeal, the Fourth Circuit reversed the district court's finding that the Underwriters intentionally destroyed their documents as clearly erroneous, and held that there was no evidence that the Underwriters had abandoned their title to the cargo. *Columbus-America Discovery Group, Inc. v. Atlantic Mut. Ins. Co.*, 974 F.2d 450, 466 (4th Cir. 1992), *rehearing en banc denied, cert. denied*, 507 U.S. 1000 (1993). (Pet. App. 30a, 62a-63a). In finding that the district court erred in applying the law of finds, rather than the law of salvage, the Fourth Circuit stated:

> Finds law should be applied, however, in situations where the previous owners are found to have abandoned their property. Such abandonment must be proved by clear and convincing evidence though, such as an owner's express declaration abandoning title. Should the property encompass an ancient and longlost shipwreck, a court may infer an abandonment.

974 F.2d at 464-465. (Pet. App. 59a-60a; 66a).

At the trial following remand by the Fourth Circuit, CADG was granted a salvage award of 92.2 percent of the value of the treasure insured by the Underwriters. (Pet. App. 8a). In making the award the district court applied the traditional law of salvage and found that the Underwriters

had proved by clear and convincing evidence ownership of the *res*. The court also directed that the *res* be sold to liquidate CADG's salvage lien and appointed CADG as the "Central Marketing Authority" to market and sell the entire treasure under the direction of the district court. (Pet. App. 8a-9a). Following an appeal of the district court's decision the salvage award was affirmed by the Fourth Circuit. *Columbus-American Discovery Group v. Atlantic Mut. Ins. Co.*, 56 F.3d 556 (4th Cir. 1995), *cert. denied*, 516 U.S. 938 (1995).

Because in the intervening years CADG failed to market the *res* and keep the court informed of its actions, on May 4, 1998, the district court removed CADG as the Central Marketing Authority stating that CADG had acted with a "lack of integrity" in violating the court's orders. (Pet. App. 10a).

Shortly thereafter, on May 19, 1998, the parties entered into a final Settlement Agreement which provided for a division of the treasure *in specie* and for the parties to endorse a confirmation "Dismissed Agreed" Order dismissing "all claims of the parties with prejudice." (Pet. App. 10a-11a, 19a).[1]

Pursuant to the Settlement Agreement, CADG and the Underwriters physically divided the treasure on June 17, 1998. (Pet. App. 11a). On June 23, 1998, the district court

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1. Because certain records were sealed in the underlying proceedings by the district court and the Fourth Circuit, the Respondents have simultaneously filed with the Clerk's office a Motion for Leave to File Lodgings Under Seal. The Settlement Agreement is included in this sealed material. The Dismissed Agreed Order was previously unsealed by the district court and is attached to the Respondent's Appendix ("Res. App.") at pages 1a-2a.

entered the Dismissed Agreed Order, previously signed by the parties, dismissing all claims with prejudice. (Pet. App. 11a-12a, 17a; Res. App. 1a-2a). As contemplated by the Dismissed Agreed Order, title to the items CADG selected during the *in specie* division was transferred to CADG free and clear of all liens and encumbrances in satisfaction of its salvage lien.[2] (Pet. App. 10a-24a; Res. App. 1a-2a).

To preserve jurisdiction of any further salvage operations contemplated by CADG, the district court on July 1, 1998 entered a second order in which it amended the Dismissed Agreed Order of June 23, 1998 "to the extent it dismisses this *in rem* action against the Defendant wreck." (Pet. App. 12a).

On July 23, 1998, CADG appealed to the Fourth Circuit from the orders entered June 23, and July 1, 1998 with a request that the Settlement Agreement be declared void and the parties returned to the status quo. (Pet. App. 12a-13a). After briefs were filed, the Fourth Circuit heard oral argument on March 2, 1999.

On or about December 8 and 9, 1999, while its appeal to the Fourth Circuit was pending, CADG sold and conveyed title to its entire 92.2 percent of the treasure it received under the Settlement Agreement to the California Gold Marketing Group. (Res. App. 3a-6a). Thereafter, CADG's share of the treasure was resold by the California Gold Marketing Group to various coin dealers who have resold the treasure to the public. (Res. App. 3a-6a, Lodging App. L1-L12) Because CADG has divested itself of title to the 92.2 percent of the treasure the parties cannot be restored to the status quo which existed prior to the Settlement Agreement.

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2. As a salvor CADG had a lien on the treasure owned by Underwriters prior to the settlement.

On February 8, 2000, the Fourth Circuit concluded that the Dismissed Agreed Order of June 23, 1998 confirming the parties' Settlement Agreement was properly entered, and it vacated the order filed July 1, 1998. *Columbus-America Discovery Group v. Atlantic Mut. Ins. Co.*, 203 F.3d 291, 302 (4th Cir. 2000) (Pet. App. 1a-29a). The court also refused to set aside the 1992 Opinion of the Fourth Circuit in this case which held the Underwriters had not abandoned their rights to the treasure. (Pet. App. 26a-29a). CADG's petition for rehearing and rehearing *en banc* were denied on March 7, 2000. (Pet. App. 142a-147a). On March 15, 2000, the Fourth Circuit issued its mandate to the district court and on April 27, 2000 the district court re-entered the Dismissed Agreed Order of June 23, 1998 as required by the mandate.

In its Petition for a Writ of Certiorari, CADG did not request this Court to set aside the Settlement Agreement or vacate the Dismissed Agreed Order that dismissed "all claims, matters and issues raised in this case" with prejudice. (Pet. App. 19a; Res. App. 1a-2a). It is apparent that the actions of the Petitioner have resolved all claims and issues in controversy and there are no issues to be considered by this Court.

SUMMARY OF THE ARGUMENT

1. The Petition for a Writ of Certiorari is moot because this case was settled in 1998 and, pursuant to the settlement, the Petitioner received title to 92.2 percent of the treasure salvaged from the S.S. CENTRAL AMERICA in satisfaction of its salvage lien, and all claims between the parties were dismissed with prejudice, including the question presented by Petitioner in its Petition for a Writ of Certiorari. Thereafter, and during the appeal of the Settlement Agreement to the Fourth Circuit, Petitioner sold the treasure

it received by virtue of the Settlement Agreement and Dismissed Agreed Order to various third parties. Since Petitioner has voluntarily accepted the benefits of the settlement of all claims and issues in this litigation, there are no issues open for this Court to consider.

2. Petitioner's request for reconsideration of the admiralty law test for an abandonment of property violates the law of the case doctrine. The issue of abandonment was fully litigated in the first trial and the first appeal in this case. In 1992, the Fourth Circuit found that the district court clearly erred in finding there was an abandonment. *Columbus-America*, 974 F.2d at 468. (Pet. App. 66a). In 1993, this Court denied CADG's Petition for a Writ of Certiorari on the abandonment issue. 507 U.S. 1000 (1993). (Pet. App. 140a). Petitioner has no right to relitigate an issue that was conclusively decided in this case nearly eight years ago.

3. There is no conflict among the circuits on the issue of abandonment considered in the 1992 decision of the Fourth Circuit as suggested by Petitioner. More significantly, this Court in *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 508 (1998), conclusively decided the meaning of "abandoned" under the Abandoned Shipwreck Act of 1987, 43 U.S.C. § 2101-2106. CADG's contention of a divergence among the circuits is unfounded.

REASONS FOR DENYING THE WRIT

I.

BECAUSE PETITIONER SOLD THE SHARE OF TREASURE IT RECEIVED UNDER THE SETTLEMENT AGREEMENT, ITS PETITION FOR A WRIT OF CERTIORARI IS MOOT

On December 8, 1999, the Petitioner conveyed title to the entire portion of the treasure it received under the Dismissed Agreed Order to a third party, the California Gold Marketing Group. (Lodging App. L1-L12).[3] [4] Because CADG sold its share of the *res* received by virtue of the Settlement Agreement and Dismissed Agreed Order, and accepted the benefits of the Settlement Agreement and Dismissed Agreed Order, it is without standing to now request the Supreme Court to review the admiralty law test for the abandonment of property as it was applied by the Fourth Circuit in this case in 1992. *Columbus-America*, 974 F.2d at 468. (Pet. App. 30a).[5] It is well established that CADG cannot accept the

3. *See also* paragraphs 16 and 17 of CADG's Motion for Emergency Relief filed in the Fourth Circuit on February 2, 2000. A copy of this Motion has been simultaneously submitted with Respondent's Motion for Leave to File Lodgings Under Seal.

4. The California Gold Marketing Group has also confirmed to counsel for the Underwriters that it purchased CADG's entire 92.2% share of the overall treasure and has already resold a large portion of it. (Res. App. 3a-6a).

5. Specifically, CADG would like this Court to review the Fourth Circuit's 1992 opinion in this case and adopt the dissenting opinion's abandonment test from that decision. (Pet. App.73a-94a).

(Cont'd)

benefits of the Dismissed Agreed Order and then seek review in a higher Court:

> No rule is better settled than that a litigant who accepts the benefits or any substantial part of the benefits of a judgment or decree is thereby estopped from reviewing and escaping from its burdens. He cannot avail himself of its advantages, and then question its disadvantages in a higher court.

Spanel v. Berkman, 171 F.2d 513, 515 (7th Cir. 1948) (*quoting Albright v. Oyster*, 60 F. 644 (8th Cir. 1894)); *see Smith v. Morris*, 69 F.2d 3, 4 (3d Cir. 1934) (right of appeal waived by accepting and retaining fee allowed by order appealed from). In *Fidelcar Mortg. Corp. v. Ins. Co. of No. Am.*, 820 F.2d 367 (11th Cir. 1987), the Eleventh Circuit reiterated that "when a litigant accepts the substantial benefits of a judgment, voluntarily and intentionally, and with knowledge of the facts, he waives the right to appeal from an otherwise adverse judgment." *Id.* at 370 (*citations omitted*).

All claims and issues in this lawsuit were settled upon the entry of the Dismissed Agreed Order all of which were dismissed with prejudice. Since all claims and issues were concluded, the Petition for a Writ of Certiorari is mooted by CADG's acceptance of the treasure as provided by the Settlement Agreement and Dismissed Agreed Order. By

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(Cont'd)

Not only will this vitiate the law of the case doctrine, but CADG previously filed a Petition for a Writ of Certiorari to this Court on that exact issue which was denied seven years ago. *See* 507 U.S. 1000 (1993) (Pet. App. 140a). The issue is moot.

selling the treasure to which it received title, CADG ratified and confirmed that all matters relating to this litigation had been concluded.[6] Because there is no claim or issue in controversy pending, the Underwriters respectfully request that the Court dismiss the Petition for a Writ of Certiorari.[7]

II.

RECONSIDERATION OF THE ABANDONMENT ISSUE VIOLATES THE LAW OF THE CASE DOCTRINE

CADG asserts that it preserved its objection to the majority opinion in *Columbus-America*, 974 F.2d 450 (4th Cir. 1992), *cert. denied*, 507 U.S. 1000 (1993), to seek reconsideration of the abandonment issue. (Pet. App. 11). CADG has no right, however, to relitigate this issue that was conclusively decided by the Fourth Circuit in the first appeal in this case more than eight years ago. To do so will violate the law of the case doctrine, which has long been recognized by this Court as a fundamental principle of our judicial system.

> No principle is better settled, or of more universal application, than that no court can reverse or annul is own final decrees or judgments, for errors of

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6. It should be noted that CADG cannot request the Court to set aside the Settlement Agreement and Dismissed Agreed Order because it has sold the treasure it received and cannot return matters to the status quo, that existed prior to the settlement when CADG was only a lienholder of the treasure owned by the Underwriters.

7. The Underwriters also sold the portion of the treasure they received by virtue of the Settlement Agreement and Dismissed Agreed Order.

> fact or law, after the term in which they have been rendered unless for clerical mistakes.

Sibbald v. United States, 12 Pet. 488, 492 (1838).

Under the law of the case doctrine, "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 816 (1988) (*quoting Arizona v. California*, 460 U.S. 605 (1983)). Once an appellate court either expressly or by necessary implication decides an issue, the decision will be binding upon all subsequent proceedings in the same case, *Key v. Sullivan*, 925 F.2d 1056, 1060 (7th Cir. 1991), including those by the appellate court which rendered the first decision. *See Knotts v. United States*, 893 F.2d 758, 761 (5th Cir. 1990). In *United States v. Monsisvais*, 946 F.2d 114 (10th Cir. 1991), the court stated:

> when a case is appealed and remanded, the decision of the appellate court establishes the law of the case and it *must* be followed by the trial court on remand. *If there is an appeal from the judgment entered after remand, the decision on the first appeal establishes the law of the case to be followed on the second.*

Id. at 116 (emphasis added) (citation omitted).

In *Columbus-America*, the Fourth Circuit in 1992 explicitly found that the district court clearly erred in finding that there was an abandonment. 974 F.2d at 468. Any variation from this ruling violates the law of the case doctrine. The Supreme Court has stated that the law of the case

doctrine promotes the finality and efficiency of the judicial process by "protecting against the agitation of settled issues." *Christianson*, 486 U.S. at 816 (*quoting* 1B J. Moore, J. Lucas & T. Currier, *Moore's Federal Practice* P0.404[1], p. 118 (1984)). *See also Fox v. Mazda Corp. of America*, 868 F.2d 1190, 1194 (10th Cir. 1989) (the law of the case "is a rule based on sound public policy that litigation should come to an end and is designed to bring about a quick resolution of disputes by preventing continued re-argument of issues already decided") (citations omitted).

> To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.

Arizona v. California, 460 U.S. 605, 619 (1983) (*quoting Montana v. United States*, 440 U.S. 147,153-154 (1979)).

The issue of abandonment was fully litigated in the first trial and the first appeal in this case. Since the Fourth Circuit's ruling in 1992, the parties have engaged in expensive and protracted litigation including three petitions for a writ of *certiorari* to the United States Supreme Court, a second trial to determine the salvage award, three subsequent appeals to the Fourth Circuit, and numerous proceedings before the district court to determine the percentages of ownership of each underwriter and to enforce the marketing of the *res*. All of these years of litigation will have been in vain if the law of this case is not followed. Furthermore, such a result is manifestly unjust, particularly

where, as here, the parties settled all claims under a Settlement Agreement, which was fully performed, and the case was dismissed pursuant to a Dismissed Agreed Order endorsed by both parties.

In *Litman v. Massachusetts Mut. Life Ins. Co.*, 825 F.2d 1506 (11th Cir. 1987), the Eleventh Circuit stated:

> The law of the case doctrine, self-imposed by the Courts, operates to create efficiency, finality and obedience within the judicial system . . . Due process, as a constitutional value, may be the cornerstone, but finality and stability, as institutional value, may be of equal importance. While the law of the case doctrine is not an "inexorable command," adherence to it helps to ensure that the essential elements are maintained in the process. Failure to honor its commands can only result in chaos.

Id. at 1511 (footnotes and citations omitted). If the law in this case is ignored, it will undermine the judicial system and result in chaos. In order for this Court to reverse the Fourth Circuit's 1992 decision on abandonment, it will necessarily put aside the sanctity of contract by invalidating the Settlement Agreement and ignore the constitutional cornerstone of finality, stability and law of the case.

III.

THERE IS NO DISPUTE BETWEEN THE CIRCUITS AS TO THE LAW OF ABANDONMENT AND THE BURDEN OF PROOF

CADG's entire claim that a conflict exists between the circuits is based exclusively on the views Judge Widener stated in this case at 203 F.3d 291, 304 (4th Cir. 2000).[8] As will be clearly demonstrated, a conflict does not exist in the decisions of the Sixth and Ninth Circuits as suggested by Judge Widener.

Specifically, Judge Widener states:

> A comparison of our earlier decision in this case in 974 F.2d 450 with the decision of the Supreme Court and the Ninth Circuit in *The Brother Jonathan* and the Sixth Circuit in *Fairport* indicates that the *rule for finding abandonment is more stringent in this circuit than in the Sixth Circuit and may be the same as the Ninth Circuit's rule in Brother Jonathan.*

203 F.3d at 304 (Pet. App. 28a) (emphasis added).

Judge Widener relies on two decisions, *Deep Sea Research, Inc. v. The Brother Jonathan,*[9] 102 F.3d 379

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8. Judge Widener was the dissenting judge in the Fourth Circuit's 1992 opinion in this case at 974 F.2d 450 and is the only living member of that Panel.

9. On remand, the Ninth Circuit vacated the judgment in its entirety except for the jurisdiction question and remanded the case (Cont'd)

(9th Cir. 1996), *aff'd. on jurisdiction and vacated on all other grounds, and remanded,* 523 U.S. 491 (1998); and *Fairport International Exploration, Inc. v. The Shipwrecked Vessel Known as the Captain Lawrence, in rem,* 105 F.3d 1078 (6th Cir. 1997), *aff'd on jurisdiction and vacated and remanded on all other grounds,* 523 U.S. 1091 (1998), both of which were vacated and remanded by the United States Supreme Court with respect to the definition of abandonment and the standards to determine abandonment.[10] This Court in *California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998) explained:

> There remains the issue whether the courts below properly concluded that the *Brother Jonathan* was not abandoned for purposes of the ASA [Abandoned Shipwreck Act]. That conclusion was necessarily influenced by the assumption that the Eleventh Amendment was relevant to the court's inquiry. The Court of Appeals' determination that the wreck and its contents are not abandoned for purposes of the ASA was affected by concerns that if "the vessel had been partially abandoned, both the federal court and the state court would

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(Cont'd)
to the district court. *Deep Sea Research, Inc. v. The Brother Jonathan*, 143 F.3d 1299 (9th Cir. 1998). *The New York Times* reported that the case settled with salvors, who had obtained underwriter's subrogated interest receiving 80 percent of the treasure. (Lodging App. L13)

10. The Ninth Circuit in *Brother Jonathan* and the Sixth Circuit in *Fairport* both dealt with the Abandoned Shipwreck Act, 43 U.S.C. §§ 2101-2106. The S.S. CENTRAL AMERICA was not subject to that act.

> be adjudicating the fate of the *Brother Jonathan*." *102 F.3d at 389*. Moreover, the District Court's inquiry was a preliminary one, based on the concern that it was premature "for the court to find that any individual items of cargo or personal property have been abandoned." *883 F.Supp. at 1354*. In light of our ruling that the Eleventh Amendment does not bar complete adjudication of the competing claims to the *Brother Jonathan* in federal court, the application of the ASA must be reevaluated. *Because the record before this Court is limited to the preliminary issues before the District Court, we decline to resolve whether the Brother Jonathan is abandoned within the meaning of the ASA. We leave that issue for reconsideration on remand, with the clarification that the meaning of "abandoned" under the ASA conforms with its meaning under admiralty law.*[11]

523 U.S. at 508 (emphasis added).

The *Fairport* decision on remand is reported at 177 F.3d 491 (6th Cir. 1999). The following statements from the Sixth Circuit on remand clearly demonstrate that no conflict exists between the circuits:

> We think that the apparent divergence of authority [between the Fourth and the Sixth and Ninth Circuits] *masks a degree of underlying agreement.* A close reading of the cases reveals a uniform

11. CADG and Judge Widener incorrectly reported the effect of the Supreme Court's decision as vacating the Ninth Circuit and Sixth Circuit's opinions "on other grounds." As the Court will note the specific reason for the remand in each case was the issue of abandonment.

concern that courts impose a high burden on those who argue that an owner abandoned property that sank against his will. *To overcome this significant hurdle, the claimant may prove abandonment by inference as well as by express deed. This proposition finds support even from those cases cited as examples of the doctrine of "express abandonment." See, e.g., Columbus-America, 974 F.2d at 464-65.* ("Such abandonment must be proved by clear and convincing evidence, though, such as an owner's express declaration abandoning title. Should the property encompass an ancient and longlost [sic] shipwreck, a court may infer an abandonment."); *Wiggins v. 1100 Tons, More or Less, of Italian Marble, 186 F.Supp. 452, 456 (E.D. Va. 1960).* ("While lapse of time and nonuser [sic] are not sufficient, in and of themselves, to constitute an abandonment, these factors may, under certain circumstances, give rise to an implication of intention to abandon."). Once these opinions recognize an exception to a rule of express abandonment, the question becomes after what length of years may a court infer abandonment; rather than draw arbitrary (time) lines separating express from implied tests, we choose to view length of time as one factor among several relevant to whether a court may infer abandonment.

We agree that lapse of time, alone, does not necessarily establish abandonment, *see e.g., Wilkie, 29 F.Cas. at 1247*, and an owner's failure to return to a shipwreck site does not necessarily prove abandonment, but we recognize that a

> combination of several facts, proved clearly and convincingly, *see* Part III.C *infra*, may support a finding that an owner has abandoned a shipwreck.

177 F.3d at 499-500 (emphasis added).

> Proof by inference still requires proof, not conjecture – a requirement bolstered by the exacting burden of proof admiralty law imposes on those who allege abandonment.

Id. at 500.

> The uniform rule in admiralty law is that a finding of abandonment requires proof by clear and convincing evidence. *See, e.g., Columbus-America Discovery Group, 974 F.2d at 467-68* ("When a previous owner claims long lost property that was involuntarily taken from his control, the law is hesitant to find an abandonment and such must be proved with clear and convincing evidence."); *Falgout Bros., Inc. v. S/V Pangaea, 966 F.Supp. 1143, 1145 (S.D.Ala. 1997).* ("Abandonment must be proven by clear and convincing evidence . . ."); *Moyer, 836 F.Supp. at 1104-05* (requiring proof of abandonment by clear and convincing evidence); *cf. Ries v. Thiesse, 61F.3d 631 (8th Cir. 1995)* (requiring creditors to prove by clear and convincing evidence a debtor's abandonment of a homestead).

Id. at 501.

> The *Fairport I* and *Brother Jonathan* district courts also recognized that, if no jurisdictional defense applies, maritime law requires proof by clear and convincing evidence. *See Brother Jonathan, 883 F.Supp. at 1351* ("Finally, the finding of abandonment must be supported by strong and convincing evidence."); *Fairport I 913 F.Supp. at 558 (citing Columbus-America 974 F.2d 450 at 468)*. The district courts rejected the admiralty standard only because they applied a burden of proof appropriate for assertions of sovereign immunity. . . . The court should consider whether Michigan can prove that it owns the shipwreck – that is, whether clear and convincing evidence shows that Behrens abandoned the *Captain Lawrence*. This burden of proof accords with maritime law and with the protection of private property rights against appropriation by the state.

Id.

The Ninth Circuit's decision in the only other case dealing with ancient shipwrecks, *Yukon Recovery, L.L.C. v. Certain Abandoned Property*, 205 F.3d 1189 (9th Cir. 2000), upheld underwriter's ownership rights to a long lost cargo of gold. Although the court did not annunciate a standard, a reading of the decision makes it clear that it does not support Petitioner's assertion of a conflict between the circuits.

A. The So-Called Conflict is a Fiction Created by Petitioner

To create a "conflict between the circuits", the Petitioner has cited on pages 17 and 18 in its brief opinions by various courts where *no one* appeared and claimed ownership to the property found. *See Martha's Vineyard Scuba Headquarters v. Unidentified, Wrecked and Abandoned Steam Vessel*, 833 F.2d 1059 (1st Cir. 1987); *Treasure Salvors Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330 (5th Cir. 1978); *Klein v. Unidentified Wrecked and Abandoned Sailing Vessel*, 758 F.2d 1151 (11th Cir. 1985). To compare one circuit's determination on abandonment where the owner does not appear and assert a claim of ownership with another circuit's determination where an owner has appeared and established ownership is duplicitous. The majority opinion in *Columbus America*, 974 F.2d at 462, discusses and distinguishes these cases. (Pet. App. 54a-55a).

Every case that has considered the issue of abandonment in the context of an underwriter's claim of ownership by subrogation to sunken treasure or cargo has upheld the underwriter's right and has reiterated that once underwriters establish ownership abandonment can only be found by clear and convincing evidence. *See, e.g., Fairport, supra.*; *Illinois v. Zych*, 186 Ill. 2d 267 (1999).

This Court in the *Brother Jonathan* decision settled the issue. It is significant that at the time of reaching a decision in *Brother Jonathan* this Court had an amicus curiae brief filed in that proceeding by CADG.[12] In its brief CADG

12. In fact, CADG filed amicus curiae briefs in the *Brother Jonathan*, *Fairport*, *Yukon Recovery* and *Zych* cases. In each brief the holding of the Fourth Circuit in *Columbus America*, 974 F.2d (Cont'd)

requested that this Court adopt a definition of abandonment which would, if applied retroactively to the instant case, divest the Underwriters of title. CADG sought to have this Court adopt a new definition that will conclusively infer abandonment after the passage of a fixed period of time. In rejecting the invitation to adopt such a definition, this Court stated that abandonment is to be determined in accordance with the traditional rules of admiralty. 523 U.S. at 508. It was the traditional rules of admiralty that were followed by the Fourth Circuit in its 1992 decision and by the Sixth, Ninth and Fourth Circuit Courts of Appeal in the above-referenced cases.

Because there is no authority to support CADG's position of a conflict in the circuits, CADG can only cite cases in which no owner or underwriter appeared to assert ownership rights to the *res* in an effort to support the contention of a conflict. CADG's attempt to create a conflict does not deserve consideration by this Court.

(Cont'd)
450, was misrepresented which accounts for the confusion in some of the decisions. *See Zych*, 186 Ill. 2d at 270, 281-282, where the court comments on CADG's amicus brief. No court has adopted CADG's position.

IV.

THE ABANDONED SHIPWRECK ACT, THE DEVELOPMENT OF ADMIRALTY LAW AND THE EMERGING NEW FIELD OF HIGH TECHNOLOGY IN MARITIME EXPLORATION ARE ONLY ENDANGERED BY THE INCONSISTENT SELF-SERVING POSITIONS ADVOCATED BY PETITIONER

CADG is arguing inconsistent positions in its brief. First, it alleges that unless there is some change in the traditional admiralty rule of abandonment the Abandoned Shipwreck Act, 43 U.S.C. § 2101, *et. seq.*, will be emasculated. It charges that salvors and insurance companies that insure lost cargoes, will join hands to salvage the lost vessels and their cargo. Because only abandoned shipwrecks become the property of the State under the Act, this will deprive the state of ownership. It then argues that unless the traditional rule is changed high technology maritime exploration will not occur.

These are completely inconsistent positions. First, if property is held to be abandoned there can be no exploration of any sort, because the State will own the property. It is only in those instances where the property is not abandoned that high technology exploration can occur. Secondly, Congress, when it enacted the Abandoned Shipwreck Act, deliberately gave the states title only to property which had been abandoned. Although Congress could have established a set period of time to invoke the principle of abandonment, it chose to rely on the traditional rules of admiralty to determine when property is deemed abandoned.

CADG reveals that it is solely interested in the benefits it may receive in this case. It seeks only to have this Court reverse the judgment of the Fourth Circuit that has been standing for eight years. If this Court should adopt the rule advocated by CADG, it will foreclose the salvage efforts of any abandoned property that may be subject to the Abandoned Shipwreck Act.

CONCLUSION

This is a case between private litigants that has been settled. Pursuant to the Settlement Agreement, all claims and issues were dismissed with prejudice, and the Petitioner has reaffirmed the settlement by selling the portion of the treasure to which it received title by virtue of the Settlement Agreement. By accepting the benefits of the Settlement Agreement confirming that all disputes between the parties were dismissed, including any claim of abandonment, and by selling its share of the treasure, Petitioner has negated or forfeited its right to appeal.

Moreover, Petitioner's attempt to have this Court review the abandonment test used by the Fourth Circuit in its 1992 opinion is violative of the law of the case doctrine, especially considering that the Supreme Court denied *certiorari* on that exact issue seven years ago. Further, there is no conflict between the circuits for the Supreme Court to resolve. All circuits that have considered the issue, in the context of a long lost wreck where a claim of ownership is made and established, have held that while an abandonment may be inferred, the length of time is not conclusive and the party claiming an abandonment must do so by clear and convincing evidence.

The Petitioner has attempted to create a conflict between the circuits by comparing factually inapposite cases where no owner or underwriter appeared in the action to assert a claim of ownership, to cases where owners have appeared and established ownership. Since these cases do not represent a conflict and there is no support for the Petition for a Writ of Certiorari, the Petition should be denied with an award of costs, expenses and attorneys' fees to the Respondents.

Respectfully submitted,

JOSEPH A. YAMALI
Counsel of Record
GEORGE R. DALY
BIGHAM ENGLAR JONES
& HOUSTON
40 Wall Street, 24th Floor
New York, NY 10005
(212) 269-5500

GUILFORD D. WARE
DAVID H. SUMP
CRENSHAW, WARE & MARTIN
1200 Bank of America Center
One Commercial Place
Norfolk, VA 23510
(757) 623-3000

Attorneys for Respondents

APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, NORFOLK DIVISION DATED, ENTERED AND FILED JUNE 23, 1998

UNSEALED 6-29-98

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA NORFOLK DIVISION

Civil Action No. 87-363-N

Columbus-America Discovery Group, Inc.

Plaintiff,

vs.

The Unidentified, Wrecked and Abandoned Sailing Vessel, etc., *in rem*, *et al.*,

Defendants.

ORDER

On the representation of the parties by their counsel that the parties have completed the division of the *res* as set forth in the Settlement Agreement signed on their behalf on May 19, 1998, all claims, matters and issues raised in this case including interest, attorneys' fees, costs and custodial expenses have been resolved to the satisfaction of the parties and all court costs have been paid; it is,

ORDERED that:

1. This case is "DISMISSED AGREED" including all claims, matters, issues, interest, attorneys' fees, costs and

custodial expenses incurred by the parties being DISMISSED WITH PREJUDICE.

2. Pursuant to the Settlement Agreement entered into by the parties, title to the items selected by the individual parties that make up their respective interest in the *res* salvaged from the S.S. CENTRAL AMERICA is hereby transferred and delivered to them free and clear of all liens and encumbrances.

3. The Court retains jurisdiction to enforce the settlement of the parties and the prior Orders in this case.

ENTER: 6/23/98

s/ J. Calvitt Clarke, Jr.
U.S. District Judge

Dated:

We ask for the entry of this Order:

COLUMBUS-AMERICA DISCOVERY GROUP, INC.

By s/ Glen A. Huff
Of Counsel

ATLANTIC MUTUAL INSURANCE COMPANY, ET AL.
UNDERWRITERS

By s/ Guilford D. Ware
Of Counsel

APPENDIX B — LETTER FROM DWIGHT MANLEY, MANAGER, CGMG TO GEORGE DALY, BIGHAM, ENGLAR, JONES & HOUSTON DATED JANUARY 31, 2000

CGMG
24 Corporate Plaza, Suite 100
Newport Beach, CA 92660
Tel: (949) 719-1966
Fax: (949) 719-1969

January 31, 2000

George Daly
Bigham Englar Jones & Houston
40 Wall Street
New York, NY 10005-2301

Dear Mr. Daly:

Thank you for taking my call today to discuss my groups purchase of The SS Central America Treasure.

As I told you, we purchased the treasure from C.A.D.G. December 8, 1999. We have subsequently taken possession and sold the gold.

We would be happy to discuss the disposition of the remaining 7% of the gold when it is resolved. Until then, we are going to continue marketing and selling our gold.

Please refrain from contacting our marketing companies, as your letter that you already sent has caused confusion and delay that can be very costly and damaging.

Appendix B

As I told you on the phone, I am sympathetic to your plight. But my group has spent many tens of millions of dollars to purchase free and clear title to the gold, and develop an extensive marketing plan. Any interference with it could result in a correspondingly large loss in revenue.

This letter is being sent to our retailers to reaffirm their right to sell our gold.

Sincerely,

s/ Dwight Manley
Dwight Manley
Manager

cc Don Doyle
David Hall
Q. David Bowers
John Albanese
Rich Howell
Rick Robol

APPENDIX C — LETTER FROM RICHARD K. HOWELL, RUTAN & TUCKER, LLP TO GEORGE DALY, BIGHAM, ENGLAR, JONES & HOUSTON DATED FEBRUARY 1, 2000

RUTAN & TUCKER LLP
ATTORNEYS AT LAW

* * *

February 1, 2000

VIA FACSIMILE AND FIRST CLASS MAIL

George Daly
Bigham, Englar, Jones & Houston
40 Wall Street
New York, NY 10005-2031

Re: *California Gold Marketing Group, LLC*

Dear Mr. Daly:

As I informed you yesterday, we are the attorneys for the California Gold Marketing Group. This letter will confirm our conversation in which you acknowledged that the Fourth Circuit Court of Appeals January 29 Order — as presently issued — does not restrain any person or entity other than Columbus-American Discovery Group from selling the treasure at issue. To the extent that you intend to take a contrary position on this matter, please notify me, in writing, immediately.

Similarly, in the event you intend to seek a court order that could potentially restrain my client or its retailers from

disposing of the treasure, I request that you notify me prior to taking such action so that my client will have the opportunity to address these issues.

Finally, as owners of approximately 92.5% of the overall treasure, my client is willing to consider any reasonable proposals you may have to bring this matter to resolution — including using any leverage we may have with Columbus-American Discovery Group. In view of the numerous representations and warranties made by Columbus America in the underlying Asset Purchase Agreement confirming, among other things, there were no court actions, orders or claims which interfered with Columbus' ability convey clear title to the treasure purchased by my client, we are gravely disturbed by the events of the past few days. Regardless, we are also concerned with the communications coming from you and your clients to our retailers and in the press and insist that all of you refrain from any further activities which will interfere with our ongoing efforts to market the treasure.

Please feel free to contact me with any questions or concerns you may have.

Very truly yours,

RUTAN & TUCKER, LLP

s/ Richard K. Howell
Richard K. Howell

RKH:jsa
cc: Dwight Manley